No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRENT EUGENE SANCHEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JENNIFER BECK
Counsel of Record for Petitioner
Assistant Federal Public Defender
Jennifer_Beck@fd.org
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192

QUESTION PRESENTED

The question presented is the one this Court expressly declined to resolve in *United States v. Castleman*, 134 S. Ct. 1405, 1414 (2014):

> Whether the mere causation of bodily injury necessarily includes the use of violent, physical force.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brent Eugene Sanchez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

DECISION BELOW

The Tenth Circuit's order denying Mr. Sanchez a certificate of appealability is unpublished but available on electronic databases at *United States v. Sanchez*, 2018 WL 321814 (10th Cir. 2018). It is also attached as Appendix A. The judgment of the district court denying Mr. Sanchez's motion is attached as Appendix B.

JURISDICTION

The Tenth Circuit entered judgment on July 2, 2018. Mr. Sanchez did not file a petition for rehearing. This petition is being filed within 90 days after the Tenth Circuit's decision and thus is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

At issue in this case is the definition of "crime of violence" as contained in 18 U.S.C. § 924(c)(3). That statutory provision provides:

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

STATEMENT OF THE CASE

Mr. Sanchez pleaded guilty to two counts of possessing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Vol. I at 5.[1] The underlying crime of violence for both counts was aggravated assault, Wyo. Stat. Ann. § 6-2-502(a)(iii). *Id.* Section 924(c)(3) defines "crime of violence" as a felony that –

> (A) Has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

On May 17, 2016, Mr. Sanchez filed a 28 U.S.C. § 2255 motion in the district court, challenging his convictions and sentence. Vol. I at 5. He argued that his § 924(c) convictions were illegal following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.* at 6. In *Johnson*, this Court reversed earlier precedent and held that the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another,"

---

[1] Citations to the record are to the two-volume record on appeal filed in the Tenth Circuit Court of Appeals.

was unconstitutionally vague. This Court explained that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and therefore "[i]increasing a defendant's sentence under the clause denies due process of law." *Johnson*, 135 at 2557.

Mr. Sanchez's argument for relief centered on two points. First, Mr. Sanchez argued that the residual clause at issue in *Johnson* was, in all material respects, identical to the residual clause of § 924(c)(3)(B). Vol. I at 6-9. Accordingly, Mr. Sanchez claimed, the residual clause of § 924(c) was unconstitutionally vague. *Id.*

Second, Mr. Sanchez argued that Wyoming aggravated assault failed to qualify as a "crime of violence" under any of the remaining clauses defining the term. *Id.* at 10. To make this argument, Mr. Sanchez relied on the Tenth Circuit's opinion in *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008). Vol. I at 11. In *Rodriguez-Enriquez*, the court held that force is characterized by "mechanical impact," i.e., the "transfer[]" of "[k]inetic energy" "to the body of the victim." *Rodriguez-Enriquez*, 518 F.3d at 1194. *Rodriguez-Enriquez* contrasted *physical* force with force of the sort caused by a poison, which achieves its effect "by chemical action, not by mechanical impact." *Id.* The court held that "injury effected by chemical action on the body (as in poisoning or exposure to hazardous chemicals) should not be described as

caused by *physical force*." *Id.* at 1196. Thus, Mr. Sanchez argued, because Wyo. Stat. Ann. § 6-2-502(a)(iii) criminalized the "threatened use of a drawn deadly weapon" it did not satisfy the force clause because it could be committed by threatening to employ a chemical weapon such as anthrax. Vol. I at 11-12.[2] Thus, Wyo. Stat. Ann. § 6-2-502(a)(iii) did not have as an essential element the use, attempted use or threatened use of "physical force" as the Tenth Circuit had defined that phrase. *Id.* at 12.

The district court rejected Mr. Sanchez's claim. Vol. IV at 32. The court held that this Court's decision in *Castleman* "eviscerated" both the "analysis" and "holding[]" of *Rodriguez-Enriquez*. *Id.* at 50 (citing *United States v. Castleman*, 134 S. Ct. 1405 (2014)). Accordingly, *Rodriguez-Enriquez* no longer held authoritative value. *Id.* The district court recognized that *Castleman* was considering the phrase "physical force" as it appeared in the misdemeanor force

---

[2] In full, Wyo. Stat. Ann. § 6-2-502(a)provides:

> (a) A person is guilty of aggravated assault and battery if he:
>
> (i) Causes or attempts to cause serious bodily injury to another intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
> (ii) Attempts to cause, or intentionally or knowingly causes bodily injury to another with a deadly weapon;
>
> (iii) Threatens to use a drawn deadly weapon on another unless reasonably necessary in defense of his person, property or abode or to prevent serious bodily injury to another . . .

clause as opposed to the felony force clause.[3] Vol. IV at 48-49. However, the court held that this was a distinction without a difference. *Id.* Because *Castleman* included the use of poison within the grasp of the misdemeanor force clause, the court held that the same had to be true for the felony force clause. *Id.* Thus, any reliance on *Rodriguez-Enriquez* was misplaced following *Castleman*. The court did not issue a certificate of appealability. *Id.* at 53.

After Mr. Sanchez filed his notice of appeal, the Tenth Circuit issued its decision in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) which controlled the issue in Mr. Sanchez's case. In *Ontiveros*, the Tenth Circuit held that *Castleman's* reasoning applied equally to the felony force clause. *Ontiveros*, 875 F.3d at 538. Thus, the Tenth Circuit held that any previous distinction drawn between "physical" and "chemical" force was no longer good law. *Id.*

Recognizing the precedential authority of *Ontiveros*, Mr. Sanchez filed a preservation brief in the Tenth Circuit admitting that his argument was foreclosed but he preserved the argument for subsequent review. Accordingly, the Tenth Circuit denied Mr. Sanchez a certificate of appealability. Appendix A. Mr. Sanchez now seeks this Court's review to determine whether the Tenth

---

[3] The term "felony force clause" refers to the force clause as used to define a "crime of violence," U.S.S.G. § 4B1.2, 18 U.S.C. § 924(c), and a "violent felony," 18 U.S.C. § 924(e). The term "misdemeanor force clause" refers to the force clause found in 18 U.S.C. § 921(a)(33)(A).

Circuit's opinion in *Ontiveros*, as applied to him, is a correct interpretation of this Court's *Castleman* decision.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari because the circuits are divided over the impact of *Castleman* on the bounds of the felony force clause. The Tenth Circuit read *Castleman* to remove any distinction between the misdemeanor and felony definitions of "physical force" and, as a result, held that doing nothing constitutes the use of violent physical force. The Tenth Circuit's decision in *Ontiveros*, and as applied to Mr. Sanchez's claim, represents a complete departure from the other circuits that have considered *Castleman's* broader applicability. These other circuits have either held that (1) *Castleman* is inapplicable to the felony force context or held that (2) *Castleman* only goes so far as to remove any previous distinction between the direct and indirect application of force.

Additionally, the decision in *Ontiveros*, which controlled Mr. Sanchez's case, is incorrect. This Court has repeatedly held that there is a clear distinction between the misdemeanor definition of "physical force" and its counterpart found in the felony force clause. *Ontiveros* removes any such distinction. Thus, *Ontiveros* directly conflicts with this Court's precedent.

Finally, the issue in this case is one of exceptional importance. The Tenth Circuit's decision exposes scores of litigants to increased sentences who would

have otherwise been immune. By expanding the scope of the felony force clause far beyond its traditional bounds, the decision in *Ontiveros* threatens the liberty interests of many. As such, it is an important issue deserving of this Court's review.

I. The lower courts are divided over *Castleman*'s impact on the felony force clause.

This Court's decision in *Castleman* has split the circuits. As background, this Court has articulated two distinct definitions for the phrase "physical force." In *Johnson I*, this Court determined what "physical force" means when used to describe violent felonies. *Johnson v. United States,* 559 U.S. 133, 136 (2010). In this context, the common-law definition of force was expressly considered, and roundly rejected. *Id.* at 139-40. Instead, when used to describe violent felonies "physical force" requires "a substantial degree of force" between "concrete bodies." *Id.* This is so because the felony force clause contemplates "active violence" and the common-law definition—which includes "even the slightest offensive touching"—would be a "comical misfit" and "produce nonsense" if applied. *Id.* at 139-41.

By contrast, in *Castleman*, this Court found that the common-law definition of "physical force" was appropriate in the context of § 922(g)(9) a statute concerning "misdemeanor crimes of domestic violence." *Castleman*, 134 S. Ct. at 1413. Relying on the common-law definition, this Court was able to

broaden the conduct covered by the misdemeanor statute at issue beyond what was prescribed in *Johnson I*. *Id*. at 1414-1415. The common-law definition of "force," and thus the conduct covered by "misdemeanor crimes of domestic violence," includes even the indirect application of force and acts such as poisoning. *Id*. Importantly, the inclusion of such acts was only possible by the adoption of the definition expressly rejected in *Johnson I*. *See id*. at 1413-1414.

Importantly, this Court limited its holding in *Castleman* to the statutory provision at issue and cautioned that its opinion should not be read to impact decisions limiting the felony force clause. *Castleman*, 134 S. Ct. at 1411 n.4, 1414. Despite this cautionary language, the circuits are split over the impact, if any, of *Castleman* on the bounds of the felony force clause.

On one side of the divide, the First and Fifth Circuit Courts of Appeals have held that *Castleman* plays no role when determining the definition of "physical force" in the felony context. [4] The Fifth Circuit Court of Appeals explained that makes little sense to look to *Castleman* – which concerned the

[4] In *Ontiveros* the Tenth Circuit stated that the First Circuit Court of Appeals had not ruled on the matter. *Ontiveros*, 875 F.3d at 537 n.2. To be sure, the First Circuit stated in a case subsequent to *Whyte* that "it need not take sides" on whether "*Castleman*'s physical force analysis applies" to the felony force clause. *United States v. Edwards*, 857 F.3d 420, 426 (1st Cir. 2017). But this does not change the holding in *Whyte* which did take a side and elected not to import *Castleman*'s physical-force analysis into the felony force context. *Whyte*, 807 F.3d at 471.

broad definition of "physical force" – when interpreting the bounds of the more restrictive definition of the phrase. *United States v. Rico-Mejia*, 859 F.3d 318, 323 (5th Cir. 2017). In the court's words, "*Castleman*'s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force." *Id.* (quoting *Castleman*, 134 S. Ct. at 1411 n.4). Moreover, as the First Circuit recognized, "*Castleman* itself was careful to state that its holding was confined to section 922(g)(9) [misdemeanor crimes of domestic violence]." *Whyte v. Lynch*, 807 F.3d 463, 471 (1st Cir. 2015).

On the other side of the divide, the Second, Third, Fourth, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have incorporated c*Castleman* to the extent that it erases any previous distinction between the direct and indirect application of force.[5] As the Fourth Circuit held, although *Castleman* expressed "formal reservation[s]" regarding broader applicability of its holding, this did not prohibit importing its reasoning into the felony force context. *United States v. Reid*, 861 F.3d 523, 528-39 (4th Cir. 2017). Thus,

---

[5] *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016), *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017), *United States v. Reid*, 861 F.3d 523 (4th Cir. 2017), *United States v. Verwiebe,* 874 F.3d 258 (6th Cir. 2017), *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017), *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016), *Arellano Hernandez v. Lynch*, 831 F.3d 1127 (9th Cir. 2016), *United States v. Haldemann*, 664 F. App'x 820 (11th Cir. 2016) (unpublished).

these circuits held that because *Castleman* stated that the common-law definition of force includes both its direct and indirect application, so too does the definition of "physical force" as it appears in the felony force clause. *See id.*

The Tenth Circuit stands alone with its holding that *Castleman* completely changed the legal landscape around the felony force clause. The panel in *Ontiveros* held that not only did *Castleman* cast aside any distinction between direct and indirect application of force, it also expanded the grasp of the felony force clause to include acts of omission. *Ontiveros*, 875 F.3d at 538. Thus, despite this Court's language that it was not deciding whether bodily injury necessarily requires "physical force" as that term is used in the felony force clause, the Tenth Circuit held that *Castleman* decided just that. Under *Ontiveros* all injury is necessarily caused by violent physical force. No exceptions apply. No other circuit has read *Castleman* to expand the felony force clause to such an extent.[6]

* * *

[6] The Seventh Circuit in *Jennings* acknowledged that it is a "challenging" issue to decide whether an act of omission – such as withholding lifesaving medication from a child – constitutes the use of violent force. *Jennings*, 860 F.3d at 459-60. However, the court did not decide the matter because it held that the statutory provision at issue would not likely be enforced in such a scenario. *Id.*

This Court should grant certiorari to resolve the division in the circuits over the impact, if any, of *Castleman* on the felony force clause and determine whether bodily injury necessarily includes the use of violent force.

II. The decision in *Ontiveros* conflicts with this Court's precedent.

In *Johnson I*, this Court set the bounds for the felony force clause. *Johnson*, 559 U.S. 133 (2010). The Court made clear that the clause evokes a category of "violent, active crimes." *Id.* at 140. Active conduct is the hallmark of violent felonies. *Id.*

Ontiveros reached the opposite conclusion. *Ontiveros* holds that completely passive crimes – statutes criminalizing omissions – fall within the grasp of the felony force clause. This Court said "active." *Ontiveros* said "passive." This Court's review is needed to bring *Ontiveros* in line with *Johnson I.*

A. The use of violent, physical force requires an underlying violent act.

Johnson I constructed its interpretation of the felony force clause by reference to Blacks Law Dictionary's definition of "physical force" and Webster's New International Dictionary's definition of "violent." *Id.* at 140-41. Black's defines "physical force" as "force consisting in a physical act." *Id.* Webster's defines "violent" as "moving, acting, or characterized by strong physical force." *Id.* The sine qua non of the felony force clause is movement, action, the physical application of strong force.

Ontiveros disobeyed this dictate. *Ontiveros* held that violent force is used even if someone does nothing. According to *Ontiveros*, so long as physical pain is caused, no movement is required; no action is needed. This contravenes *Johnson I*. This Court's review is needed to rectify this error.

B. Non-violent misdemeanors do not constitute violent felonies.

In *Johnson I*, this Court rejected the notion that misdemeanors should be used to mark the bounds of the felony force clause. *Id.* at 141-42. Specifically, this Court stated that common-law battery plays no role in determining the conduct covered by the felony force clause. *Id. Johnson I* recognized that there were two different ways to commit the common-law crime of battery: (1) by offensive touching or (2) by causing injury. *Id.* Historically, both of these were misdemeanor crimes. *Id.* at 141. "But even today a simple battery—whether of the mere-touching or bodily-injury variety—generally is punishable as a misdemeanor." *Id.*. The parameters of common-law battery – whether committed by causing bodily injury or through offensive touching – are immaterial to the felony force clause. *Id.* at 142.

Ontiveros did what this Court expressly said should not be done. It relied on the misdemeanor crime of common-law battery to decide whether Colorado second-degree assault qualified under the felony force clause. *Ontiveros* reasoned that the felony force clause covers omissions because common-law battery covers omissions. *Ontiveros*, 875 F.3d at 538. In the panel's own words,

"if it is impossible to commit a [common-law] battery without applying force, and a [common-law] battery can be committed by an omission to act, then second-degree assault must also require physical force." *Id.* This Court said that this analysis is prohibited. "At common-law, battery—*all* battery, and not merely battery by the merest touching—was a misdemeanor not a felony." *Johnson*, 559 U.S. at 142. "There is no reason to define 'violent felony' by reference to a nonviolent misdemeanor." *Id. Ontiveros* ignores this demand.

C. The misdemeanor force clause and the felony force clause are independent and distinct.

This Court has made clear that the felony force clause and the misdemeanor force clause are not interchangeable. In *Johnson I* this Court rejected the common-law definition of "physical force" and elected to demand a higher degree of force for the felony force clause. *Johnson*, 599 U.S. at 140. Importantly, this Court noted that the common-law definition of "force" would produce "nonsense" in the violent felony context. *Id.* In so doing this Court cautioned that it was not deciding the parameters of the misdemeanor force clause. *Id.* at 144.

In *Castleman*, by contrast, this Court did consider the parameters of the misdemeanor force clause. *Castleman*, 134 S. Ct. 1405 (2014). This Court determined that the misdemeanor force clause requires a lesser degree of force than violent force. The misdemeanor force clause only requires common-law

force; mere offensive touching qualifies as common-law force. This Court made clear that its decision should not be read to impact the felony force clause. *Id.* at 1411 n.4, 1414. The felony force clause and the misdemeanor force clause are separate and distinct. Prior to *Ontiveros*, the Tenth Circuit had recognized the importance of these two distinct definitions. *United States v. Harris*, 844 F.3d 1260, 1265 (10th Cir. 2017).

Ontiveros erased any distinction between these two definitions. *Ontiveros* relies on the presumption that the felony force clause is synonymous with its misdemeanor counterpart. *Ontiveros* reasoned as follows: (1) Physical harm requires misdemeanor force ("force in the common-law sense"); (2) the misdemeanor crime of common-law battery requires causation of physical harm; (3) the misdemeanor crime of common-law battery can be committed by acts of omission; (4) therefore, any causation of physical harm, even when done by omission, requires the use of felony force. *Ontiveros*, 875 F.3d 538. The syllogism starts with misdemeanor force and concludes with felony force.

This reasoning only works if misdemeanor force, force in the common-law sense, is enough to make an offense a crime of violence under the felony force clause. But this Court explicitly held in *Johnson I* that misdemeanor force is insufficient to make an offense a crime of violence under the felony force clause. *Johnson*, 559 U.S. at 140. In contrast to the misdemeanor force clause addressed in *Castleman*, the felony force clause addressed in *Johnson I*

requires violent force – that is, a level of force more active and severe than the force required to commit common-law battery. *Id.* *Ontiveros* failed to honor this distinction and, as such, it stands in direct conflict with this Court's authority.

III. *Ontiveros* presents an issue of exceptional importance.

Ontiveros greatly expands the scope of conduct covered by the felony force clause in the Tenth Circuit. After *Ontiveros*, the clause now includes *all* crimes that have as an element the causation of physical pain or injury, this is so even if the criminalized conduct is the failure to act. This expansion is unprecedented. As noted, versions of the felony force clause appear in 18 U.S.C. § 924(e), requiring a 15-year mandatory minimum, 18 U.S.C. § 924(c), requiring consecutive mandatory minimums of five, seven, ten, and 25 years, 18 U.S.C. § 16(a), requiring removal of aliens, and the Guidelines. U.S.S.G. § 4B1.2 (defining what crimes qualify as "crimes of violence"). *Ontiveros* controls the interpretation of all these. The impact of *Ontiveros* will be seen in a surge of defendants exposed to dramatic sentencing range increases, statutory mandatory minimums, and removal proceedings. The magnitude of liberty interests impacted constitutes a matter of exceptional importance that should be decided by this Court.

Moreover, a large number of crimes that common sense shows to be non-violent now likely qualify as crimes of violence and violent felonies in the Tenth Circuit. A few examples from states within Tenth Circuit include felony hazing

causing bodily injury, distribution of a controlled substance resulting in serious bodily injury, abandonment of a child, causing injury while practicing without a medical license, and elder neglect.[7] Moreover, *Ontiveros* takes the unprecedented step of opening the doors to the felony force clause and allowing in all conduct that results in pain and bodily injury even if the state has a general criminal liability statute extending liability to acts of omission.[8] The liberty interests at play make this issue one of great importance.

CONCLUSION

For the reasons set forth above, Mr. Sanchez respectfully requests that this petition for writ of certiorari be granted.

//

//

//

//

---

[7] Statutory citations in order of appearance in text: Utah Stat. Ann. § 76-5-107.5(3)(d), Kan. Stat. Ann. § 21-5430, Kan. Stat. Ann. § 21-5605(b), Okla. Stat. Ann. § 650.11, and Wyo. Stat. § 6-2-507.

[8] *See, e.g.,* Ala. Code § 13A-2-3; Alaska Stat. § 11.81.600; Ariz. Rev. Stat. Ann. § 13-201; Ark. Code Ann. § 5-2-204; Colo. Rev. Stat. Ann. § 18-1-502; Del. Code Ann. tit. 11, § 242; Haw. Rev. Stat. § 702-200; Iowa Code Ann. § 702.2; Ky. Rev. Stat. Ann. § 501.030; Mo. Ann. Stat. § 562.011; Mont. Code Ann. § 45-2-202; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; N.Y. Penal Law § 15.10; N.D. Cent. Code § 12.1-02-01; Ohio Rev. Code Ann. § 2901.21; Or. Rev. Stat. § 161.095; Pa. Cons. Stat. Ann. tit. 18, § 301; Tex. Penal Code Ann. § 6.01.

Date: September 7, 2018

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Jennifer Beck
JENNIFER BECK
Assistant Federal Public Defender
Counsel of Record for the Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002